Office-Supreme Court, U.S.
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84-691

No. 84- ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL ASSOCIATION OF NVOCCs and FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC. and TWIN EXPRESS, INC. and INTERNATIONAL CONTAINER EXPRESS, INC., *Petitioners,*

and

AMERICAN TRUCKING ASSOCIATIONS, INC.; TIDEWATER MOTOR TRUCK ASSOCIATION; HOUFF TRANSFER, INC.; AMERICAN WAREHOUSEMEN'S ASSOCIATION; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *Respondents,*

v.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. Did the Court of Appeals properly disregard the restrictions imposed by maritime law in determining that the employers of longshoremen have a right to control the disputed work for the longshoremen's benefit?

PARTIES BELOW

The proceeding in the court whose judgment is sought to be reviewed involved four consolidated cases. The caption of this petition for certiorari reflects the parties in Case No. 83-1214.[1]

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[1] Other parties in the other consolidated cases (Case Nos. 83-1185(L), 83-1424 and 83-1486) include: American Trucking Associations, Inc.; and Tidewater Motor Truck Association; American Warehousemens Association; International Brotherhood of Teamsters; International Longshoremen's Association, AFL-CIO; New York Shipping Association; Council of North Atlantic Shipping Associations; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company and Marine Terminals, Inc.; Coordinated Caribbean Transport, Inc.; Marine Terminals, Inc.; Coordinated Caribbean Transport, Inc.; International Longshoremen's Association, Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922 and 1970, AFL-CIO; International Longshoremen's Association, Atlantic Coast District Council, AFL-CIO; International Longshoremen's District Council, Baltimore, Maryland; International Longshoremen's Association, Hampton Roads District Council, AFL-CIO; Hampton Roads Shipping Association; and Southeast Florida Employers Port Association.

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APPENDIX

IN THE

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OCTOBER TERM, 1984

No. 84- ——

INTERNATIONAL ASSOCIATION OF NVOCCs and FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC. and TWIN EXPRESS, INC. and INTERNATIONAL CONTAINER EXPRESS, INC., *Petitioners,*

and

AMERICAN TRUCKING ASSOCIATIONS, INC.; TIDEWATER MOTOR TRUCK ASSOCIATION; HOUFF TRANSFER, INC.; AMERICAN WAREHOUSEMEN'S ASSOCIATION; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *Respondents,*

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NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The International Association of NVOCCs, Florida Customs Brokers and Forwarders Association, Twin Express, Inc., and International Container Express, Inc. petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Opinion of the Court of Appeals, officially reported, 734 F. 2d 966 may be found in the Joint Appendix of Petitioners at Jt. App. 1A.[2] The Decision and Order of the National Labor Relations Board in *International Longshoremen's Ass'n. (Dolphin Forwarding, Inc.). (Dolphin II)* is reported at 266 NLRB 230 (1983) and may also be found in the Joint Appendix at 35A.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 9, 1984. The Petition for Rehearing and Rehearing In Banc, filed by ATA and TMTA on May 23, 1984, was denied by the Court of Appeals on July 31, 1984. Jt. App. 31a. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) (Act) are as follows:

Section 8(b), 29 U.S.C. § 158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—

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[2] Cited hereinafter as "Jt. App. ——." Petitioners American Trucking Associations and Tidewater Motor Truck Association, International Ass'n. of NVOCCs, American Warehousemen's Ass'n., Houff Transfer, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America have joined in the preparation of the Joint Appendix.

> 4(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:
>
> * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike, or primary picketing; . . .

Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . .

The relevant portions of the maritime laws include the Shipping Act of 1984, Public Law No. 98-236, 98 Stat. 67 (March 20, 1984), the Maritime Labor Agreement Act of 1980, 46 U.S.C. § 801 *et seq.*, the Interstate Commerce Act, 49 U.S.C. § 2, and the Shipping Act, 1916, 46 U.S.C. §§ 812 and 814. These statutes may be found in the Joint Appendix at 259a.

STATEMENT OF THE CASE

This Petition seeks review of a decision by the United States Court of Appeals for the Fourth Circuit affirming in part and reversing in part a decision by the NLRB in Dolphin II, which arose out of a remand by this Court in 1980 of an earlier decision of the Board.[3] NLRB v. International Longshoremen's Association, 447 U.S. 490 (*ILA*).

The subject of this litigation is the legality of the Rules on Containers (Rules) negotiated by the International Longshoremen's Association (ILA) with the Council of North Atlantic Shipping Associations (CONASA) and the New York Shipping Association (NYSA) acting as agents on behalf of vessel operating common carriers and stevedoring companies which employ longshoremen. The central issue is whether the Rules advance lawful primary or unlawful secondary objectives within the meaning of §§ 8(b)(4)(B) and 8(e) of the Act. NLRB Administrative Law Judge Harmatz found the Rules valid under labor law, in part, as applied to less-than container load (LCL) cargo, but invalid, in part, as applied to certain full shipper loads (FSL) cargo. Judge Harmatz refused, despite this Court's clear mandate, to consider whether federal maritime law deprived the ocean carriers of the requisite control over the work claimed by the Rules.

The Board affirmed and adopted Judge Harmatz' decision with, in part, some different rationale but

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[3] ILA (Dolphin Forwarding Co., Inc.), 236 NLRB 525 (1978) (Dolphin I).

fully adopted Judge Harmatz' refusal to consider whether federal maritime law deprived the employers of the right to control the disputed work.

The Court of Appeals also declined to consider the impact of maritime law on the validity or invalidity of the Rules stating simply that the right of control argument "lacks any semblance of merit" Jt. App. 25A. The Court emphasized the mere physical control of containers prior to their release to all shippers, ignoring all legal restraints concerning such release of containers. In its analysis of Judge Harmatz' rationalization the Court of Appeals repeated the simplistic assertions that the ocean carrier employers "own or lease the containers and can therefore prescribe the conditions under which they may be released" . . . thus concluding "that under such circumstances the 'right of control' resides with the shipping companies, the parties to the Rules". Jt. App. 20a.

A. Procedural History

The Rules on Containers have been the subject of continuous litigation for over a decade. There is no dispute that the Rules seek to obtain for ILA the work of stuffing and stripping containers that previously had been done by the non-ILA employees of consolidators and NVOCCs (non-vessel operating common carriers) who function within fifty miles of the seaports on the Atlantic and Gulf coasts. This objective is not seriously contested. Indeed, the Rules on Containers themselves explicitly require the steamship companies to deny containers to any consolidator or NVOCC who functions within this fifty-mile perimeter.

The consolidation and NVOCC industry continues to be viable only because various legal actions had prevented implementation of the Rules. In *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 NLRB 956 (1975) and in subsequent cases, the Board focused on the off-pier traditions of NVOCCs and consolidators. The Board concluded that the Rules were unlawful because the ILA had no off-pier work traditions. The United States Court of Appeals for the Second Circuit enforced the Board's order in *International Longshoremen's Association* v. *NLRB*, 537 F.2d 706 (1976), *cert. denied*, 429 U.S. 1041 (1977). In a number of subsequent cases, the Board followed this off pier/on pier locational approach and reached the same conclusion regarding the unlawfulness of the Rules on Containers.[4]

However, in *International Longshoremen's Association* v. *NLRB*, 613 F.2d 890 (D.C. Cir. 1979), the U.S. Court of Appeals for the District of Columbia disagreed with the Board's approach and concluded that emphasis must be placed on the work traditions of the ILA.

In light of the conflict in the circuits and the importance of the issue, this Court issued a writ of certiorari to the Court of Appeals for the District of Columbia Circuit. On June 20, 1980, this Court affirmed the decision of the Court of Appeals for the

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[4] *See e.g.*, ILA (Dolphin Forwarding, Inc.), 236 NLRB 525 (1978); ILA (Puerto Rico Marine Management Inc.), 245 NLRB 171 (1979); ILA (Beck Arabia, Ltd.), 245 NLRB No. 172 (1979); ILA (Associated Transport, Inc.), 231 NLRB 351 (1977); ILA (Terminal Corporation), 250 NLRB No. 4 (1980).

District of Columbia Circuit. *NLRB* v. *International Longshoremen's Association,* (ILA) 447 U.S. 490. Pursuant to its decision, the Court vacated the Board's order in *Dolphin Forwarding, Inc.,* 236 NLRB 525 (1978) and in *Associated Transport, Inc.,* 231 NLRB 351 (1977) and remanded those cases to the Board for reconsideration. Following this Court's decision, the Court of Appeals for the Second Circuit recalled its mandate in *International Longshoremen's Association* v. *NLRB,* 537 F.2d 706 (1976) which had enforced the Board's order in *Consolidated Express* and *Twin Express* and had remanded those cases to the Board for reconsideration. The remand also included other cases involving the validity of the Rules.[5]

This Court did not reach any conclusion as to whether the Rules on Containers were lawful or unlawful. This Court's objection to the approach of the Board was quite specific; namely, the Board had inappropriately *focused* on the off-pier traditions. Such a focus was inconsistent with the need to consider "all the surrounding circumstances" under the test established in *National Woodwork Manufactur-*

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[5] The Board's decisions in *International Longshoremen's Ass'n* (Puerto Rico Marine Management), Inc., 245 NLRB 171 (1979) and in *International Longshoremen's Ass'n, Local 1359* (Beck Arabia, Ltd.), 245 NLRB 172 (1979) were also remanded to the Board for reconsideration. These cases were then pending before the Courts of Appeals for the Fifth and Fourth Circuits, respectively. The Board also decided *sua sponte* to consider its decision in *Terminal Corporation,* 250 NLRB 4 (1980); *Hill Creek Farms, Inc.* and *Customs Brokers and Forwarders Association of Miami, Inc.,* as part of the same proceeding on remand.

ing v. *NLRB*, 386 U.S. 612 (1967). In remanding, this Court instructed the Board to undertake the complex task of assessing whether there exists a sufficient "historical and functional relationship" between work traditionally performed by longshoremen and the work sought by the Rules. Accordingly, the circumstances to be considered are the work traditions of longshoremen as well as the traditions of those affected by the boycott, the economic personality of the industry, and the nature and effect of the technological changes.

This Court also noted that, even if the Rules are deemed to be lawful "work preservation," the Board must further determine whether the steamship carriers have the power to implement the Rules. If not, the "right of control" test requires the conclusion that the Rules are secondary and unlawful.

Subsequent to the decision of this Court, ILA and various employer associations agreed to implement the Rules as of January 1, 1981. Beginning on that date, the steamship carriers refused to release containers for loading and unloading to NVOCCs, consolidators, motor carriers and warehousemen operating establishments within fifty miles of the port terminals. This action prompted the filing of unfair labor practice charges by the International Association of Non-vessel Operating Common Carriers, Twin Express, Inc. and the American Trucking Associations, Inc. ("ATA").

After concluding that there was reasonable cause to believe that the Rules continued to violate the Act, the General Counsel sought and obtained an injunction prohibiting enforcement of the Rules.

Pascarell v. *New York Shipping Association,* No. 81-13 (D.N.J. 1981).[6]

Pursuant to orders of the National Labor Relations Board issued in January and February of 1981, all of the old as well as the new cases involving the Rules on Containers were consolidated for expedited hearing for the purpose of receiving any further evidence in light of the remand by this Court.

B. Decision of the Administrative Law Judge

On September 29, 1981, Administrative Law Judge Joel A. Harmatz issued his decision which found that the Rules on Containers as applied to NVOCCs were lawful work preservation agreements. As to the specific issue of work preservation the Administrative Law Judge concluded that the consolidation and NVOCC industry was itself a primary beneficiary of the containerization technology and, apparently, for that reason was an appropriate subject for longshoremen's claims. The ALJ did not, however, confront fairly the issue of whether the historical and functional relationship between the work lost by longshoremen and the work claimed in this case is sufficient to conclude that the Rules on Containers are a lawful work preservation agreement.

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[6] The United States Court of Appeals for the Third Circuit affirmed the issuance of the injunction by the District Court. *Pascarell* v. *New York Shipping Association, Inc., et al.,* 650 F.2d 19 (1981). This Court denied the petition of the ILA and NYSA for a writ of certiorari to the Court of Appeals for the Third Circuit on October 5, 1981.

Finally, the Administrative Law Judge concluded that it would be "mischievous" to apply the well-established right of control standard to this case. His reasoning for this conclusion was confusing and seems to be that, because the steamship carriers played such an important role in technological changes, the right of control should not be applied. The Administrative Law Judge offered no legal support whatsoever for this limitation on the right of control analysis.

C. Summary of Facts

With the history of longshoremen's work as a starting point, it is clear that the traditional work of longshoremen has been loading and unloading cargo on and off ships. Prior to containerization, longshoremen would accept break bulk cargo on behalf of the carrier and handle it in such a way as to effecuate its movement on and off the ship. These functions might well include unitizing the cargo on pallets so that the loading and unloading functions on behalf of the carriers could be more efficiently accomplished. However, it is also clear that if cargo came to the ports already unitized or otherwise placed in, by today's standards, small containers for the benefit of the shipper, longshoremen would accept the cargo in that form and would not rehandle and reunitize the cargo.

During this period consolidators performed their own functionally different services with employees not represented by ILA. Consolidators, actually, were not involved with the loading and unloading of cargo. Instead, they were concerned with specialized services provided to the shipping public. Their services in-

cluded preparing goods for delivery to the pier in a manner that most benefits the shipper. The services performed by consolidators were done for the convenience and benefit of the shippers and not the carriers. There may have been some similarity between unitizing cargo for purposes of loading and unloading ships and the work of consolidators preparing goods for shipment. Nevertheless, these functions, even before modern containerization, were historically and functionally quite different.

With the advent and growth of containerization, the respective basic roles and functions described above did not change. Surely, however, the nature of the work of loading and unloading ships changed quite dramatically. Instead of accepting and then unitizing break bulk cargo, longshoremen's primary task involved the loading and unloading of containers on and off ships. Until the events giving rise to this litigation, longshoremen did not attempt to rehandle containers delivered to the port. The stuffing and stripping of containers by longshoremen was basically limited to the deliveries by shippers who delivered their goods to the pier in some form other than in containers. Not until 1973, long after containers had become prevalent, did ILA make any real effort to obtain a substitute for its purported work lost because of efficiencies gained by containerization. Indeed, in a number of agreements longshoremen accepted the containerization technology with the soothing effects of considerable monetary payments by the steamship carriers which would, in turn, be paid for by the shipping public.

Containerization was but one aspect of substantial technological changes that provided a whole new

means of intermodal transportation. Consolidators and NVOCCs indeed have played and continue to play an important function in this entire new technology. The basic role of consolidators and NVOCCs remain the same—namely, providing an array of services for the shipping public to facilitate the entire transportation. These services and functions remain quite distinct historically and functionally from the services provided by longshoremen.

In 1973, long after the proliferation of containerization and related technology, ILA sought to acquire work as a substitute for the work it allegedly lost. A likely victim for this acquisitive intent was the NVOCC industry, generally dominated by small businesses. Yet, the history and functions of the NVOCC industry are quite distinct from those of the longshoremen work. There is not a sufficient connection to permit the ILA to claim and demand the NVOCC work.

Finally, the NVOCC industry has long been recognized by the Federal Maritime Commission as providing specialized services to the shipping public. The services and rates of NVOCCs are set forth in tariffs filed with the FMC. In addition, the NVOCC industry is protected by the shipping laws and cannot be discriminated against in providing its services to the shipping public. Indeed, under decisions of the Federal Maritime Commission, NVOCCs cannot be denied containers nor can they be the subject of discriminatory treatment. In short, the steamship companies do not have authority consistent with the shipping laws, to implement the Rules on Containers and discriminate against NVOCCs.

ARGUMENT

The Rules on Containers are Violations of the NLRA Because the Steamship Carriers Do Not Have the Power to Assign the Work Sought Under the Right of Control Test

Judge Harmatz refused to apply the right of control test as formulated and implemented by the Board and accepted by the Supreme Court in *NLRB* v. *Enterprise Association of Pipefitters,* 429 U.S. 507 (1977). The decision of Judge Harmatz does not dispute the thrust of the shipping laws. Indeed, he specifically refers to the decision of the Federal Maritime Commission which held that the Rules on Containers violate the Shipping Act. Despite these precedents, Judge Harmatz asserted that "to honor the FMC rulings would be mischievous in the present posture of the case." Jt. App. 168a. In support of this position, Judge Harmatz offers no cogent legal arguments. Instead, he points out the obvious that the policies underlying the shipping laws are distinct from the policies underlying labor laws.

Judge Harmatz' decision constitutes a veiled disapproval of the right of control test. The real logic underlying the decision is that because the steamship companies and other members of NYSA are in large part the progenitors of the containerization technology, the right of control test is not applicable here. Thus, Judge Harmatz uses his analysis with respect to the work preservation issue to circumvent the clear impact of the right of control test. To avoid the right of control test, the judge necessarily must conclude that the Shipping Act and administrative decisions thereunder are not to be considered and adhered to in assessing right of control.

The proper application of the right of control test in this case leads to the inescapable conclusion that the subject rules on containers violate 8(b)(4) and 8(e). Simply stated, the Rules on Containers require the carriers to discriminate against NVOCCs and consolidators. Indeed, the Rules call for a boycott under which NVOCCs and consolidators are denied containers—the very lifeblood of their operations. These aspects of the Rules on Containers are in direct contradiction to an important principle underlying the shipping laws, namely, non-discrimination among the shippers. Since the carriers cannot, consistent with the shipping laws, implement the direct mandate of the Rules on Containers, the right of control test applies and requires the conclusion that the Rules on Containers cannot be enforced consistent with the NLRA.

As this Court stated under the "right of control test" outlined in *Pipefitters,* an otherwise lawful agreement for work preservation may nevertheless violate the Act if the contracting employer lacks the "power to give the employees the work in question"; for "if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work" *ILA* 447 U.S. 504. Therefore, this Court directed that even if, on remand, the Board found "a lawful work preservation objective" the Board should then consider whether the employers "did not have the right to control" the disputed work. *Id.* at 511, 512.

"Power," as used by the Supreme Court in the context of the right to control test, includes the *legal*

ability or right to agree to the union demands. This is not the manner in which Judge Harmatz uses "power," as he states "as the job guarantees embodied in said Rules take effect as pre-condition to the release of containers said obligations are imposed upon signatory employers at a time when the latter possess *power* to comply" Jt. App. 153a (emphasis added).

Under this analysis, the right of control test would have been rejected in *Pipefitters*. There the subcontractors had an agreement with the union to perform all cutting and threading of pipe on the job site. The general contractor who had subcontracted heating and airconditioning work to the subcontractor, specified the use of factory installed pipe. Despite that contract, the subcontractor had the *"power"* to order uncut and unthreaded pipe to be cut and threaded on the job site in disregard of his legal obligation under the contract. If the Court had adopted Judge Harmatz' view, granting paramount concern to the collective bargaining agreement, the union's refusal to handle the precut and prethreaded pipe would have been upheld and the current law would be summarized in Judge Harmatz' maxim—the employers "having failed to honor their commitments to the ILA, are fair game for primary strike action . . . ." Jt. App. 178a, 179a n.95.

The Board's and this Court's recognition in *Pipefitters* of the validity of contract, and applicable principles of contract law, rendered the union's refusal to handle an unlawful secondary objective. Here in directly analogous circumstances, by affording recognition to the validity of common carrier legal obligations, the requirements of the Shipping Act, 1916

and the Intercoastal Shipping Act, 1933, as well as contractual obligations of the carriers' tariffs and bills of lading, the Board and the Court of Appeals should have found, that under the right of control test, the employers have no *legal* right to implement the Rules on Containers, and therefore the union's conduct has an unlawful secondary objective.

Section 14 (Fourth) of the Shipping Act 1916 (Shipping Act) 46 U.S.C. Section 812 (1976) makes it unlawful for any "common carrier by water" to "unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodation or other facilities." Section 16 (First) of the Act prohibits a common carrier by water from giving "any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[7] Section 18(a) requires a carrier by water to provide "just and reasonable rates, fares, or charges, classifications, and "just and reasonable regulations and practices relating thereto . . . and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivery of property."[8]

The Rules on Containers implemented by the contracting employers as carriers have been held to be violations of sections 14 Fourth, 16 First, 17, 18(a) and 18(b) of the Shipping Act, 1916 and sections 2 and 4 of the Intercoastal Act, 1933 whether as included in tariff provisions of the carriers or as prac-

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[7] 46 U.S.C. Section 812j (1976). Section 812, 46 U.S.C. Section 815 (1976).

[8] 46 U.S.C. Section 817 (1976).

tices which should be included in tariff provisions.[9]

The FMC, in holding the Rules violated Sections 14, 16 and 18 (1916 Act) and Section 4 (1933 Act) by subjecting some containers to stripping and restuffing and arbitrarily denying some shippers containers (*Sea-Land Service, Inc. et al. Rules on Containers, supra*) stated in full the legal obligations imposed on the carriers by the Shipping Act:

> PRMSA will not supply PRMSA containers to certain consolidators and deconsolidators, whereas PRMSA will supply its containers to other shippers and consignees in the same geographic area. PRMSA's rules on containers unfairly treat and unjustly discriminate against certain consolidators and deconsolidators inasmuch as PRMSA does not provide them the same facilities (con-

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[9] See Sea-Land Service, Inc.—Proposed Rules on containers, 16 S.R.R. (P & F) 315 (ALJ Initial Decision, *aff'd*, 18 SRR (P & F) 553 (FMC 1978) *aff's sub nom, Conasa* v. *FMC*, 672 F 2d 171 (D.C. Cir 1982) *cert. denied* 103 S. Ct. 69 (Oct. 1982) D.C. Cir. remanded in light of *ILA* and *FMC* v. *PMA* 435 U.S. 40 (1978). On remand the FMC aff'd its previous decision *Sea Land Service—Proposed Rules on Containers* 21 S.R.R. (P & F) 853 (1982). On July 2, 1982 D.C. Cir. vacated FMC's dismissal of further proceedings in its report on Remand and ordered FMC to defer action till completion of Supreme Court consideration of Petition for writ in *Conasa* (supra) and completion of FMC consideration of FMC Dkt 81-11, the current hearing on the 1981 implementation of the Rules 21 SRR (P & F) 1057 (1982). Decision of the administrative Law Judge in Dkt 81-11 is pending. The D.C. Circuit did not set aside the FMC findings on the merits. See also *South Atlantic and Caribbean Lines, Inc.*, 12 FMC 237, 241-242 (1969); *U.S.* v. *Sea-Land Service, Inc.* 424 F. Supp. 1008, 1011, 1112 (D.N.J. 1977) appeal dismissed 577 F.2d 730 (3rd Cir. 1978), cert. denied 439 U.S. 1072 (1979); *Consolidated Express, Inc.* v. *Sea-Land Service, Inc.*, 16 S.R.R. 817, 822-830 (1976).

tainers) as PRMSA provides other shippers and consignees, in violation of section 14 Fourth.

PRMSA's rules on containers are in violation of section 14 Fourth insofar as these rules permit certain container loads to move freely over facilities of PRMSA, that is, over the piers, while PRMSA's rules also require other similar container loads to be stripped and restuffed at the piers by ILA deep sea labor. The unlawful discrimination results from the unequal availability of the piers for movement of container loads to and from ships. Clearly, PRMSA's tariff rules on containers unfairly treat and unjustly discriminate against certain shippers and consignees in the matter of cargo space accommodations and other facilities, including the use of the piers and the use of containers for consolidated shipments.

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PRMSA's rules on containers are in violation of section 16, First, in that they unduly prefer certain shippers and consignees, such as for example those who have certain facilities and whose employees stuff and strip containers, while these rules subject other shippers and consignees to undue and unreasonable prejudice and disadvantage, such as for example those shippers and consignees who do not have their own facilities or do not have their own employees to stuff and strip containers.

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[The] rules are unreasonable in a number of other ways, including that they deny containers to some shippers while providing containers to other shippers, and that the rules require certain consignees to warehouse their imports under certain restrictions while not so requiring other consignees to so warehouse their products. [The] rules on containers are unjust and unreasonable in violation of section 18(a) of the 1916 Act and of section 4 of the 1933 Act.

> . . . all shippers should be treated substantially equally, provided of course that they seek and receive the same ocean transportation service from the same ocean common carrier. *Proposed Sea-Land Services, Inc., Rules on Containers,* 16 SRR 315.

The FMC held that such rules are unlawful regardless of whether the rules were lawful under labor law. In so doing, the FMC relied upon several leading cases that firmly established the principle that parties to collective bargaining agreements cannot ignore requirements imposed by other laws.[10] Applying this principle in the context of the Shipping Act, Justice Harlan concurring in *Volkswagenwerk* v. *FMC* stated:

> Multi-employer collective bargaining must therefore be reconciled with the sometimes competing policies of federal laws promoting and regulating competition, viz. the antitrust laws and in the case of maritime labor relations, the Shipping Act.
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> 390 U.S. 261 (1968) (Harlan, J., concurring).

Carriers may set rates, charges and establish practices so long as they are consistent with common carrier obligations. These obligtions, deeply rooted in common law and codified in the shipping statutes, are: (1) a duty to treat all shippers alike—large shippers, small shippers, shippers far from the port or within fifty miles of the port (46 USC 815, 816); (2) a duty to establish reasonable practices relating

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[10] See United Mineworkers v. Pennington, 381 U.S. 657, 664-65 (1965).

to the receipt, handling and delivery of freight (46 USC 816); (3) a duty to treat all shippers fairly and without discrimination in matters of cargo space accommodations or other facilities or the loading and handling of freight (46 USC 812).

Containers have regularly been supplied by carriers—and since they are supplied to some shippers, they *must be supplied* to all shippers. Even carriers which do not operate cellular or roll-on/roll-off container vessels supply containers. Sometimes these containers are the 20 or 40 ft. trailer body; sometimes truck trailers (with wheels); sometimes lift vans or Dravo or Conex boxes. Under the shipping laws, once the carrier has decided to make containers available, the carrier must supply all shippers with the equipment.

Similarly, the carrier cannot require the unstuffing (or stripping) and reloading of containers of some shippers at the piers while not requiring it of other shippers without violating shipping laws.

The fundamental consideration is whether whatever services are furnished by the carrier are offered on a reasonable and nondiscriminatory basis. See, *e.g.*, *Grace Line, Inc.* v. *FMB,* 280 F. 2d 790, 792-793 (2nd Cir. 1960), *cert. denied,* 364 U.S. 933 (1961); *Swayne & Hoyt, Ltd.* v. *U.S.,* 300 U.S. 297, 303 (1937).

It is also clearly established that a carrier may not discriminate against cargo on the basis of who owns the goods transported, and that, as a shipper, a consolidator or NVOCC must be given the same treatment as any other shipper. See e.g., *ICC* v. *Delaware, L. & W. R.R.,* 220 U.S. 235, 252 (1911). Moreover,

a carrier may not justify discriminatory treatment of shippers even on the basis that a shipper competes with the carrier. *See, e.g., American Trucking* v. *Atchison T. & S.F.R. Co.*, 387, 406-408 (1967); *Isbrandtsen Co., Inc., et al.* v. *States Marine, et al.*, 6 F.M.B. 422, 446-447 (1961), affirmed in relevant part *sub nom. States Marine Lines, Inc.* v. *FMC*, 114 U.S. App. D.C. 225, 227, 313 F.2d 906, 908 (1963), *cert. denied*, 374 U.S. 831 (1963).

It has been uniformly recognized, moreover, that the obligation of common carriers to provide service for all indiscriminately is not removed by the presence of "hot cargo" clauses in collective bargaining agreements. *See, e.g., Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617, 625-630 (1957); *Carpenter's Union* v. *Labor Board*, 357 U.S. 93, at 109-111 (1958); *Merchandise Warehouse Co.* v. *A.B.C. Freight For. Corp.*, 165 F. Supp. 67, 75, (SD Ind. 1958). In fact, even "peaceful picket lines coupled with union contractual provisions acquiesced in by the carriers" has been held not to excuse the carriers' obligation or to allow it to interfere with the rights of persons not parties to a collective bargaining agreement. *See, e.g., Pickup and Delivery Restrictions, California, Rail*, 303 I.C.C. 579, 594 (1958). Even a strike by a carrier's own employees does not completely relieve it of its obligations under transportation law. *Railway Employees* v. *Florida E.C.R. Co.*, 384 U.S. 238, 244-245 (1966). Indeed, a carrier must provide service to a particular shipper at the risk of a total labor shutdown forcing it out of business. See *Montgomery Ward & Co.* v. *Northern Pacific Term. Co.*, 128 F. Supp., 475, 518 (D.Ore. 1953).

Since containers are "transportation facilities" their ownership is irrelevant and carriers are not free to discriminate as between shippers with respect to the service provided. *Cf. Grace Line, Inc.* v. *FMB,* 280 F.2d 790, *supra.* Thus, the statements by carrier executives, that containers of the ocean carriers are exclusively theirs, and that they own them, insure them, maintain them, etc. are irrelevant to the issues here.

Thus, in adopting measures to ease the unemployment impact of revolutionary changes involved in containerization, the carriers and the unions may not disregard other laws while bargaining under the labor laws and must reconcile any resolutions adopted in collective bargaining with competing policies of other federal laws, which, in the case of maritime labor relations includes the Shipping Act, 1916.[11]

For example, the Supreme Court held in *Volkswagenwerk* that an assessment formula to establish a compensation fund, as a solution to precisely what is involved in the current 50-mile container rules cases before the Board, i.e., mitigation of the impact on employees of technological unemployment resulting from containerization, violated sections of the Shipping Act because the assessment formula discriminated as between shippers in several ways, including the receiving, handling, storing and delivering of cargo. Thus, the carriers' discretion in or control over, collectively bargained resolutions of these prob-

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[11] Thus, a particular definition of the work in controversy or the ultimate legality of the Rules under labor laws will not determine their legality under the Shipping Act.

lems is constrained by the requirements of the Shipping Act.

Additionally, the FMC also declared that carrier-employers of ILA may not lawfully change existing tariff rules which encourage, through compensating consolidation allowances, consolidation of cargo in containers by NVOCC-consolidators off-pier. The Commission found that NVOCC-consolidators provide a valuable service to their shipper-customers and ocean carriers alike, that the NVOCC-consolidation industry serves a useful transportation purpose and is in the public interest and that maintenance of the consolidation allowance system is in the public interest and that action to eliminate, or effectively to eliminate, the system is *prima facie* contrary to the public interest. *Cancellation of Consolidation Allowances Rules, FMC* Dkt. 76-35, 18 SRR 637, 648 (1978).

In sum, the Shipping Act forbids ocean carriers to condition the use of containers by NVOCCs upon compliance with the Rules or to impose different cargo handling requirements upon some shippers and not others. Since carriers lack the legal right under the shipping laws and their contracts of carriage to selectively withhold containers and container services, the contracting employers lacked discretion to accede to the union's desires.

In his decision, Judge Harmatz took the position that the "administrative-judicial process is most effectively served by each agency acting on its own in the area of its special expertise." Jt. App. 171a.

By ignoring the shipping law requirements, however, Judge Harmatz violated well-estabished prece-

dent that requires the NLRB to give effect to Congressional enactments other than labor laws. *See, e.g., Southern Steamship Co.* v. *NLRB,* 316 U.S. 314 (1942). Moreover, Judge Harmatz mistakenly relies upon Local 1976, *United Brotherhood Carpenters* v. *NLRB,* (Sand Door) 357 U.S. 93 (1958) which does not preclude the Board from considering the FMC decisions in the present case. Significantly, *Sand Door* was decided before the enactment of section 8(e) and prior to the *Pipefitters'* right of control test.

In sum, Judge Harmatz' refusal to apply the right of control standards in this case, and the Board's and the Court of Appeals affirmance of that decision, are contrary to established precedent and disregard this Court's directive in *ILA* to apply the right of control test on remand. It is clear, under *Pipefitters,* the Union's objective and enforcement efforts are secondary and unlawful under sections 8(e) and 8 (b)(4) of the Act.

The Court of Appeals decision that Maritime law may be disregarded in determining the employer's right to control the disputed work and instrumentalities of commerce is a dangerous precedent which this Court should correct.

CONCLUSION

The Petition for a Writ of Certiorari should be granted as to the question presented.

Respectfully submitted,

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